

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA
RENO, NEVADA

VIVIAN ELSA SIMON, EDWARD)	03:04-cv-0472-ECR (VPC)
SIMON, AND DONALD SIMON)	
)	
Plaintiffs,)	
)	<u>ORDER</u>
vs.)	
)	
LEN MANN and DOES 1 through)	
20, inclusive,)	
)	
Defendants.)	
_____)	

I. Procedural Background

On August 31, 2004, Plaintiffs Vivian Elsa Simon, Edward Simon, and Donald Simon (Plaintiffs) filed a Complaint (#2) for damages, alleging a breach of fiduciary duty to minority shareholders. On June 1, 2005, Plaintiff Donald Simon filed an Ex-Parte Motion (#52) for Preliminary Injunction and Temporary Restraining Order. On June 3, 2005, we issued an order (#54) denying the motion for temporary restraining order and allowing for responses to the motion for preliminary injunction. Defendant Len Mann filed an Opposition (#60) to the Motion on June 20, 2005, to

1 which Plaintiff Donald Simon replied (#62) on June 30, 2005.
2 Plaintiffs Edward and Vivian Simon filed a motion (#63) to join
3 Donald Simon's motion (#52) on July 5, 2005.

4 For the reasons stated below, Plaintiffs' motion (#63) to join
5 will be **GRANTED** and Plaintiffs' motion (#52) for preliminary
6 injunction will be **DENIED**.

7 8 **II. Factual Background**

9 Plaintiffs and Defendant are shareholders of United States
10 Welding Corporation ("USWC"), currently incorporated in Nevada.
11 USWC was established by Plaintiffs' now-deceased father
12 approximately 45 years ago in California. Defendant Mann was
13 originally hired as a consultant in 1987 and now runs the business
14 in Nevada. At the time the instant lawsuit was filed, the
15 breakdown of ownership of the corporation was as follows:
16 Defendant Mann owned approximately 44% of the shares, Plaintiffs'
17 mother, Ruth Simon, owned approximately 44%, and Plaintiffs owned
18 diverse fractions of the remaining 12%.¹ The Board of Directors
19 consists of Defendant Mann, Plaintiff Donald Simon, and Ruth Simon.

20 In 1991, Ruth Simon and Len Mann entered into a buy-sell
21 agreement, which was subsequently modified in 1993. The details of
22 the agreement, including whether or not it provided for binding

23
24 ¹As discussed below, Plaintiffs have raised concerns over a buy-
25 sell agreement between Defendant Mann and Ruth Simon and an
26 arbitration order regarding the agreement which compels Ruth Simon to
27 sell all her shares to Defendant. It is not clear to the court at
28 this time whether or not Ruth Simon is currently a shareholder or a
director. Her motion to intervene was dismissed by this court without
prejudice and it is anticipated that she may renew her attempt to
intervene.

1 arbitration, are in dispute. Defendant Mann commenced arbitration
2 pursuant to the agreement in 2002 in an attempt to establish that
3 Ruth Simon had become disabled and, pursuant to the agreement, must
4 sell her shares to Mann. The arbitrator agreed with Mann and
5 issued an award requiring Ruth Simon to sell her shares to Mann at
6 a price and manner Plaintiffs allege is unjust. Ruth Simon claimed
7 that the arbitration was not binding, but the First Judicial
8 Circuit of Nevada affirmed the award. Ruth Simon has appealed to
9 the Nevada Supreme Court and settlement conferences are ongoing.

10 Plaintiffs allege serious charges of mismanagement, self-
11 dealing, and manipulations of the corporate framework on the part
12 of Defendant Mann. Among other things, they allege Mann has
13 cancelled annual shareholder meetings and terminated directors'
14 fees to Ruth and Donald Simon. Plaintiffs move (#52) for a
15 preliminary injunction to "1) enjoin Len Mann from acting
16 unilaterally and outside of USWC corporate governance, 2) from
17 acting in a manner that would harm USWC and its shareholders [,
18 and] 3) for reinstatement of USWC director's fees on both a
19 retroactive and ongoing basis."

21 **III. Discussion**

22 Defendant has not objected to Plaintiff Vivian and Edward
23 Simon's motion (#63) to join the motion (#52) for preliminary
24 injunction, and we will grant their motion (#63).

25 A party seeking a preliminary injunction must meet one of two
26 tests in the Ninth Circuit. Stanley v. Univ. of S. Cal., 13 F.3d

1 1313, 1319 (9th Cir. 1994). The traditional test requires a
2 plaintiff to show that:

- 3 1. [he] will suffer irreparable injury if injunctive
relief is not granted;
- 4 2. [he] will probably prevail on the merits;
- 5 3. in balancing the equities, the [defendant] will not
be harmed more than the [plaintiff] is helped by
the injunction; and
- 6 4. granting the injunction is in the public interest.

7 Id. (formatting altered).

8 In the alternative, a court may issue a preliminary injunction
9 if the plaintiff shows either:

- 10 1. "a combination of probable success on the merits
and the possibility of irreparable injury;" or
- 11 2. "that serious questions are raised, and the balance
of hardships tips sharply in his favor."

12 Id. (formatting altered).

13 Although phrased as such, the alternative test is less an
14 either/or formulation as it is a type of sliding scale. Its two
15 prongs represent "'extremes of a single continuum,' rather than two
16 separate tests." Sun Microsystems, Inc. v. Microsoft Corp., 188
17 F.3d 1115, 1119 (9th Cir. 1999) (quoting Benda v. Grand Lodge of
18 Int'l Ass'n of Machinist & Aerospace Workers, 584 F.2d 308, 315
19 (9th Cir. 1978)). That is, the more the balance of hardships tips
20 in favor of the plaintiff, the less probability of success must be
21 demonstrated. Walczak v. EPL Prolong, Inc., 198 F.3d 725, 731 (9th
22 Cir. 1999).

23 Whichever test is applied, a preliminary injunction should
24 only be granted if the movant does not have an adequate remedy at
25 law. Stanley, 13 F.3d at 1320 (citing Beacon Theatres, Inc. v.
26 Westover, 359 U.S. 500, 506-07, n.8 (1959)). A preliminary
27

1 injunction is an "extraordinary and drastic remedy, one that should
2 not be granted unless the movant, *by a clear showing*, carries the
3 burden of persuasion." Mazurek v. Armstrong, 520 U.S. 968, 972
4 (1997) (quoting 11A Charles Alan Wright & Arthur Miller, Federal
5 Practice & Procedure § 2948 (2d ed. 1995)). "The cases best suited
6 to preliminary relief are those in which the important facts are
7 undisputed, and the parties simply disagree about what the legal
8 consequences are of those facts." Remlinger v. State of Nev., 896
9 F. Supp. 1012, 1015 (D. Nev. 1995).

10 We cannot determine from the evidence and claims presented
11 that Plaintiffs will probably succeed on the merits of their claims
12 or that the balance of hardships tips sharply in their favor. The
13 bylaws presented as evidence by Plaintiffs have the word "void"
14 written at the top of the first page, the meeting called to remove
15 Plaintiffs as directors was cancelled pursuant to compliance with
16 state court rulings, and Plaintiffs have not presented specific
17 evidence to demonstrate that Mann will attempt to remove them in
18 the future. In addition, given that the state court has been
19 involved with many of the issues for which Plaintiffs seek relief,
20 it is beyond our jurisdiction to address those issues. (See order
21 (#33) "The Rooker-Feldman doctrine provides that the federal
22 district court does not have jurisdiction to hear a case that would
23 require the court to review a state court judgment") Also,
24 to the extent Plaintiffs seek relief for Ruth Simon, such relief is
25 not available because Ruth Simon is not a party to this action.
26 Finally, an injunction reinstating directors' fees would be
27 inappropriate as that is the sort of remedy available at law. See

1 Stanley, 13 F.3d at 1320 (backpay available as legal remedy and so
2 not appropriate for preliminary injunction).

3 Thus, Plaintiff has not made a clear showing that the
4 "extraordinary and drastic remedy" of a preliminary injunction is
5 warranted in this case. See Mazurek, 520 U.S. at 972.

6
7 **IT IS, THEREFORE, HEREBY ORDERED** that, as addressed above,
8 Plaintiffs' motion to join (#63) is **GRANTED**.

9
10 **IT IS, THEREFORE, FURTHER ORDERED** that, as addressed above,
11 Plaintiffs' Motion for Preliminary Injunction (#52) is **DENIED**.

12
13 DATED: This 16th day of March, 2006.

14
15
16 

17 UNITED STATES DISTRICT JUDGE
18
19
20
21
22
23
24
25
26
27
28